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Nos. 90-1262, 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, THE MUNICIPAL LEAGUES REPRESENTING OVER 9000 CITIES IN TWENTY-SIX STATES, AND FIVE INDIVIDUAL CITIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The Association of Metropolitan Sewerage Agencies, the National Institute of Municipal Law Officers, the Southeastern Colorado Water Conservancy District, the municipal leagues representing more than 9,000 cities in twenty-six states, and five individual cities submit this

brief as amici curiae in support of the petitioners and urge this Court to reverse the decision by the U.S. Court of Appeals for the Tenth Circuit in *Oklahoma* v. *EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

INTEREST OF THE AMICI CURIAE

The amici associations and cities strongly urge this Court to reverse the decision below because the Tenth Circuit's misinterpretation of the Clean Water Act will have a devastating impact on cities and municipal treatment facilities throughout the country.

The amici associations represent cities and municipal sewerage authorities located all across the nation. In particular, the Association of Metropolitan Sewerage Agencies is a national non-profit association of 116 municipal sewerage agencies and special purpose sewerage districts. Its member agencies are responsible for managing nearly all of the nation's large publicly owned treatment works, serving a combined population of over eighty million people.

The National Institute of Municipal Law Officers is an association of municipal attorneys who represent approximately 1400 cities, counties, and special municipal districts in the United States. It is organized and operated for educational and local government related purposes. The Southeastern Colorado Water Conservancy District is a quasi-municipal governmental district established under the Colorado Water Conservancy Act. The District is a governmental entity that exercises taxing powers to provide funding for water diversion projects which supply water to many Colorado municipalities.

The twenty-six state municipal leagues joining this brief are voluntary associations of municipalities organ-

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[1] The petitioners and respondents in both cases have consented to the filing of this brief. The letters granting their consent have been filed with the Clerk of the Court.

ized to serve municipal governments and represent their interests before the legislative, executive and judicial branches of the state and federal governments. Together, the amici state leagues represent more than 9000 municipalities and cities. Specifically, the leagues joining this brief are:

Arkansas Municipal League	479 municipal members
Colorado Municipal League	248 municipal members
Georgia Municipal Association	400+ municipal members
Association of Idaho Cities	181 municipal members
Illinois Municipal League	982 municipal members
League of Kansas Municipalities	527 municipal members
Louisiana Municipal Association *	269 municipal members
Michigan Municipal League	504 municipal members
League of Minnesota Cities	801 municipal members
Montana League of Cities and Towns	128 municipal members
League of Nebraska Municipalities	375 municipal members
Nevada League of Cities	18 municipal members
New Hampshire Municipal Association	232 municipal members
New Jersey State League of Municipalities	560 municipal members
New Mexico Municipal League	99 municipal members
Association of Towns of the State of New York	890 municipal members
North Carolina League of Municipalities	496 municipal members

* The Louisiana Municipal Association prefers not to take a position on the first issue at this time and therefore only joins Part II of this brief.

North Dakota League of Cities	341 municipal members
Ohio Municipal League	640 municipal members
League of Oregon Cities	238 municipal members
Pennsylvania Municipal League	250 municipal members
Municipal Association of South Carolina	257 municipal members
South Dakota Municipal League	314 municipal members
Tennessee Municipal League	321 municipal members
West Virginia Municipal League	232 municipal members
Wyoming Association of Municipalities	97 municipal members

The five individual municipalities joining this biref range from a large city in a major metropolitan area to three small towns in northwestern Arkansas.[2] These individual municipalities, like most of the thousands of municipalities represented by the state amici municipal leagues, operate municipal waste water treatment plants that must discharge treated effluent into interstate waterways, in compliance with the Clean Water Act.

Municipalities will directly bear the brunt of the Tenth Circuit's decision because they build and operate wastewater treatment plants. Just as every city needs a source of water, so too must every city provide

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[2] Most municipalities have joined this brief through their state municipal leagues. However, a few municipalities also joined in their individual capacities because of special circumstances. The Arkansas municipalities of Siloam Springs, Rogers and Springdale all discharge into the same river that is involved in the present case, and the Tenth Circuit's decision is being, or will soon be, applied directly to block the permit renewals of these cities' municipal treatment plants. Minneapolis is at the head of the Mississippi River, and therefore, the Tenth Circuit's decision will potentially require that city's treatment plant to comply with the water quality standards of as many as nine or ten downstream states.

a system for collecting, treating, and removing the wastewater generated by its residents. In order to discharge the treated effluent, municipal treatment plants must apply for and obtain a discharge permit under the National Pollutant Discharge Elimination System ("NPDES") of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1988). Over 16,000 municipal treatment plants are currently operating with approved NPDES permits. In addition, a large number of new and upgraded facilities will be needed by the end of this century to meet the goals of the CWA. Total expenditures on new and upgraded municipal treatment plants are expected to exceed $100 billion by the year 2000.

The Tenth Circuit's decision will make it significantly more difficult for municipal treatment plants to receive new or renewed discharge permits under the CWA, because the court imposed two new and very stringent conditions for permit approval. First, the court construed the CWA as requiring point sources to strictly comply with the water quality standards of downstream states, in addition to the standards of the source state. Permitting agencies were afforded no flexibility to interpret or deviate from downstream state standards. Second, the court held that no new permit can be issued to a facility which is upstream from an existing violation of a relevant water quality standard, even if the facility's discharge would have no detectable impact on water quality. In many cases, the Tenth Circuit's decision may prevent the issuance of NPDES permits for municipal treatment plants constructed to comply with the CWA.

The increased difficulty in obtaining permits for municipal treatment plants will place extraordinary burdens on cities and municipalities throughout the nation. Already these cities are struggling under the weight of mounting fiscal difficulties. In attempting to ascertain and comply with the standards chosen by downstream states, cities would be required to expend more of their increasingly

scarce resources, even as federal grants for the construction of wastewater treatment plants are being cut.

For these reasons, the amici parties representing cities and municipal treatment facilities that are almost certain to be harmed by the Tenth Circuit's decision have a substantial and direct stake in the present case and respectfully urge this Court to reverse the decision of the Tenth Circuit.

SUMMARY OF THE ARGUMENT

The Tenth Circuit's first holding regarding the interstate application of water quality standards will disrupt the balanced approach and mechanism Congress created in the CWA to resolve interstate water quality disputes. The statutory provisions enacted by Congress recognize the legitimate environmental and economic interests of both upstream and downstream states. Under the CWA, EPA is assigned the role of final arbitrator to balance the competing interests of upstream and downstream states. EPA can block a permit if the upstream state discharge would have an undue impact on water quality in the downstream state. The Tenth Circuit's decision completely changes the rules for resolving interstate water quality disputes under the CWA, by giving a downstream state absolute power to impose its water quality standards on upstream states with no mechanism or mediator to prevent unreasonable or unjust results.

The Tenth Circuit's second holding, imposing a permit ban upstream from existing water quality violations has no explicit basis in the CWA, will cause widespread economic and environmental harm, and threatens to disrupt one of the principal goals of the CWA—the construction of publicly owned wastewater treatment plants. Moreover, the court's holding is directly inconsistent with section 303(d) of the CWA, which grants states with existing water quality violations broad discretion to implement wasteload allocation plans designed to gradually bring affected water segments into compliance. This pro-

vision, which would allow new discharges or increased discharges from existing sources consistent with an approved wasteload allocation plan, cannot be reconciled with the Tenth Circuit's approach of banning all new discharges, irrespective of their impact on water quality.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION DISRUPTS THE DELICATE BALANCE BETWEEN THE INTERESTS OF UPSTREAM AND DOWNSTREAM STATES ESTABLISHED BY THE CLEAN WATER ACT AND CREATES AN UNJUST AND UNWORKABLE REGULATORY SCHEME.

The Tenth Circuit's decision completely changes the rules for resolving interstate water quality disputes under the CWA. It gives a downstream state absolute power to impose its water quality standards on upstream states, with no mechanism or mediator to prevent unreasonable or unjust results. This decision will disrupt the careful balance of upstream and downstream state interests established by Congress in the CWA, undermine the federal role as mediator of interstate water quality disputes, and adversely affect thousands of municipalities across the country.

A. The Clean Water Act Establishes A Reasonable Balance Between The Legitimate Interests Of Both Upstream And Downstream States.

The statutory scheme created by Congress in the CWA makes permitting agencies responsible for mediating interstate water quality disputes, subject to EPA oversight. By requiring point sources to comply strictly with the water quality standards of downstream states, the court of appeals ignored this statutory scheme, ostensibly to protect downstream states. Moreover, the court's interpretation conflicts with the measures Congress purposely enacted to provide such protection and to assure

a fair and reasonable balance between the interests of upstream and downstream states.

In particular, Congress included at least three alternative safeguards in the CWA to protect downstream states from upstream discharges. First, Congress deliberately structured the CWA to prevent the establishment of upstream "pollution havens" by requiring states to comply with minimum federal requirements.[3] State water quality standards must be approved by EPA to ensure that they meet or exceed the federal criteria. CWA § 303(a), 33 U.S.C. § 1313(a).[4] This requirement prevents an upstream state from adopting inadequate water quality standards which would leave the waters of a downstream state potentially vulnerable.

Second, the CWA provides a consultative mechanism whereby a downstream state can express its concerns about upstream discharges to the permitting authority for the source state. CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5); CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2). The permitting agency must consider the downstream state's recommendations and determine whether additional limitations are necessary to protect downstream water quality. While these provisions do not give a downstream state veto power over permit decisions in an upstream state, *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490 (1987), they do afford the downstream

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[3] *See* S. Rep. No. 370, 95th Cong., 1st Sess. 73 (1977), *reprinted in* 4 Senate Comm. on Environment and Public Works, Legislative History of the Clean Water Act of 1977, at 633, 706 (1978).

[4] If a state's water quality standards are not consistent with EPA's criteria or otherwise defensible, and the state does not make the needed changes in a timely manner, EPA is required by the CWA to promulgate adequate standards. CWA § 303(a), 33 U.S.C. § 1313(a). In addition, section 510, 33 U.S.C. § 1370, allows states to adopt stricter water quality standards that exceed the federal criteria, but these more stringent standards can only be applied against in-state dischargers. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 328 (1981) (*Milwaukee II*).

state the right to be consulted and to have the permitting agency consider its views.

Finally, the CWA authorizes EPA to veto any state-issued permit that fails to protect adequately the water quality of a downstream state. If a state permitting agency declines to adopt the written recommendations of a downstream state to ameliorate the interstate effects of a proposed permit, EPA is given discretion to veto the state-issued permit. CWA § 402(d)(2)(A), 33 U.S.C. § 1342(d)(2)(A).[5] Thus, EPA is assigned the role of arbitrator under the CWA to balance the competing interests of upstream and downstream states, and to block a permit issued by the upstream state that would have an undue impact on water quality in the downstream state.

The Tenth Circuit failed to recognize these alternative mechanisms that Congress specifically adopted in the CWA for protecting the waters of downstream states. Instead, the court created a new, one-sided approach that allows a downstream state to unilaterally impose its standards on upstream sources. Unless overturned by the Court, this decision would effectively empower downstream states to veto permits for upstream facilities, and would disrupt the carefully crafted balance between the interests of upstream and downstream states established by Congress in the CWA.

B. Congress And This Court Have Both Recognized The Need For A Federal Mediator To Resolve Interstate Water Disputes.

The fair and efficient resolution of interstate water quality disputes will often require a mediator, and in enacting the CWA Congress assigned that responsibility to EPA. Interstate water quality disputes arise because

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[5] EPA's decision whether to veto the permit is discretionary, and federal courts have held that a decision not to veto the permit is unreviewable. *District of Columbia* v. *Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980).

of the inherent tension between the geographical fact that U.S. waterways are predominantly interstate and the political reality that water quality policies vary among states. The many important differences in economic, industrial, social, political, and geographic conditions among states inevitably result in different priorities for state waters. When neighboring states set different priorities for adjoining segments of the same waterway, full-scale state-versus-state disputes can erupt in which the legitimate interests of both downstream and upstream states are threatened.

A federal mediator is needed to resolve these interstate water disputes so that states may not unjustly or unreasonably impose their policy choices on adjoining states. This mediation role can be filled either by a federal agency or the federal courts. Traditionally, the federal courts have arbitrated interstate disputes over water quality and water rights.[6] In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) (hereinafter *Milwaukee I*), this Court confirmed that in resolving interstate water pollution disputes the federal courts should apply federal, not state, law. *Id.* at 102.[7] *Accord Hinderlider* v. *La Plata*

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[6] *See, e.g., Colorado* v. *New Mexico*, 459 U.S. 176 (1982) (water rights); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945) (water rights); *Colorado* v. *Kansas*, 320 U.S. 383 (1943) (water rights); *New York* v. *New Jersey*, 256 U.S. 296 (1921) (water quality); *Kansas* v. *Colorado*, 206 U.S. 46 (1907) (water rights); *Missouri* v. *Illinois*, 200 U.S. 496 (1906) (water quality).

[7] Although the specific holding of *Milwaukee I* that courts should apply federal common law to resolve interstate water quality disputes was overtaken by Congress' comprehensive 1972 amendments to the CWA, *see infra*, this Court continues to cite *Milwaukee I* for the proposition that state law is inapplicable to interstate disputes implicating conflicting state interests and that federal law must govern. For example, in *Texas Indus., Inc.* v. *Radcliffe Materials, Inc.*, 451 U.S. 630 (1981), this Court relied upon *Milwaukee I* for its conclusion that federal law should control interstate and international controversies. "In these instances, our federal system does not permit the controversy to be resolved under state law . . . because

Co., 304 U.S. 92, 110 (1937) (rights in interstate streams "have been recognized as presenting federal questions").

In the 1972 CWA amendments, Congress shifted the responsibility for mediating interstate disputes from the federal courts to EPA. Prior to the enactment of these amendments, the CWA was not sufficiently comprehensive to resolve the interstate water disputes that were likely to arise. *Milwaukee I*, 406 U.S. at 107. This Court therefore held that disputes would be resolved in accordance with federal common law, as interpreted and applied by the federal courts. *Id.* at 107-08. In revisiting the ongoing litigation between Illinois and Milwaukee after the enactment of the comprehensive 1972 amendments to the CWA, this Court held that the new NPDES scheme created by Congress preempted federal common law and that the amended Act now entrusted federal oversight of water quality standards and resolution of interstate water quality disputes to EPA as the expert administrative agency. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*).

In implementing its role as a federal mediator under the CWA, EPA has adopted a case-by-case approach to mediate such disputes, pursuant to the Congressional mandate described above. Accordingly, when promulgating its final regulations governing the development of state water quality standards, EPA declined to adopt specific rigid procedures for mediating interstate disputes, explaining that it would mediate any conflicts engendered by incompatible state standards on a case-by-case basis after considering all of the relevant circumstances. EPA, Water Quality Standards Regulations, 48 Fed. Reg. 51,400, 51,413 (1983).

The case-by-case approach adopted by EPA is consistent with the Court's recognition in *Milwaukee I* that

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the interstate or international nature of the controversy makes it inappropriate for state law to control." *Id.* at 641.

"[t]here are no fixed rules that govern," and that all the equities and facts peculiar to the particular case must be considered when deciding water quality disputes. 406 U.S. at 106-08. Similarly, when resolving water rights issues, the Court has stressed the need for "expert administration rather than judicial imposition of a hard and fast rule" because of the complicated and delicate questions presented when adjudicating the relative rights of states. *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943). It was in light of these considerations that EPA elected in its water quality standards regulations to continue the case-by-case approach recognized as necessary by this Court.

The Tenth Circuit's decision, by contrast, "usurp[s] EPA's role under the Act as the arbiter of interstate water pollution disputes." EPA Pet. at 12-13. If the decision is upheld, EPA will lose its authority to prevent unreasonable results or to craft compromises that would adequately protect all affected interests. There will no longer be a means for achieving a final and equitable resolution of conflicts between states, leaving municipalities and other permit applicants caught in the middle of intractable interstate water quality disputes.

C. The Decision Below Will Produce Unfair And Counterproductive Consequences By Impeding Permit Approvals For Municipal Wastewater Treatment Plants Across The Country.

Municipalities, and special purpose districts created by state legislatures to provide wastewater treatment services, will suffer the most severe consequences of the Tenth Circuit's holding. Prior to the Tenth Circuit's decision, downstream states had an advisory, but not a controlling, role in upstream permitting decisions. Thus, downstream states were compelled to negotiate and compromise with upstream states to reach mutually acceptable resolutions of potential water quality disputes. Under the Tenth Circuit's decision, however, downstream states will have the

unilateral right to block new and renewed upstream permits whenever they choose by imposing exceptionally stringent standards. Placing such absolute power over upstream states in the hands of downstream states not only usurps EPA's statutory power to mediate interstate disputes, but also eliminates any incentive for downstream states to reach negotiated solutions. The inevitable result will be a dramatic increase in contested permit proceedings and state-versus-state litigation. Any prolongation or complication of the permitting process will harm virtually every municipality nationwide. Increased costs will necessarily result, imposing substantial additional economic burdens on municipalities and their residents.

The Tenth Circuit's holding also will result in burdensome new conditions in the NPDES permits of many municipal wastewater treatment plants. In the past, such facilities have been designed and built to ensure compliance with the water quality standards of the source state. Under the Tenth Circuit's decision, many municipalities will now be forced to undertake costly modifications and retrofitting of existing facilities to meet downstream standards even though such changes may be unnecessary and result in no benefit to the environment or to water quality.

The burden imposed on municipalities by the Tenth Circuit's holding is compounded by the fact that downstream states can choose to implement more stringent standards at any time. Thus, even those facilities that do manage initially to achieve compliance with all federal, source state, and existing downstream state standards may in the future be forced to implement even more onerous control measures if a downstream state decides later to adopt more stringent standards.[8] Municipalities

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[8] NPDES permits are issued for a maximum of five years and EPA's regulations require permit renewals to incorporate new condi-

will face long-term uncertainties regarding the future costs and requirements for operating their wastewater treatment plants.

The impact of the Tenth Circuit's decision will be especially severe today, with so many municipalities facing steadily mounting financial crises. Resources for water pollution control are becoming increasingly scarce as the federal construction grant program is phased out. If municipalities are forced to expend substantial resources to modify or retrofit their treatment plants as a result of the Tenth Circuit's decision, the current financial problems facing our cities will be compounded dramatically. Some municipalities may be denied permits altogether by the court's new rule, and therefore barred from legally discharging their effluent. Such municipalities would be put in the impossible position of being forced to shut down their wastewater treatment facilities, jeopardizing the ability to provide sewage and other water treatment services for their residents. Municipalities, unlike many industries and other sources requiring permits, simply do not have the option of avoiding such a shutdown by moving to another location.

Given these potentially dire consequences, there must be safeguards to prevent the imposition of unreasonable requirements on sources in upstream States. The statutory scheme enacted by Congress provides such a mechanism, since it requires permitting agencies to consider and balance all affected interests. In contrast, the Tenth Circuit's holding will allow downstream states to impose their standards on upstream sources without any consideration whatsover of the harm to upstream communities.

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tions necessary to ensure compliance with any intervening changes in applicable water quality standards. 40 C.F.R. § 122.43(b)(1). Under the Tenth Circuit's holding, a municipal treatment plant that discharges into an interstate waterway will therefore be constantly vulnerable to changes in a downstream state's standards, which may require major new expenditures and modifications by the plant.

Heretofore, the promulgation of water quality standards has always involved the balancing of economic and environmental considerations so as to improve water quality without causing undue economic and social hardship. *See, e.g.*, EPA, Water Quality Standards Regulations, 48 Fed. Reg. 51,400 (1983). From the outset, Congress indicated that water quality regulations "must relate the economic and social benefits to be gained with the economic and social costs to be incurred." [9] EPA accordingly has directed states to consider the economic impact on municipalities when setting or revising water quality standards:

> States should consider the economic effects associated with controls beyond the technology-based requirements in Section 301(b)(1)(B) of the Clean Water Act. If water quality standards require municipal treatment beyond those levels, EPA believes States should evaluate both the municipality's ability to make the initial pollution control investment and their financial capability over time for continued operation and maintenance. States should also evaluate changes to disposable income resulting from increased user charges or higher taxes. Another effect to consider is a situation where the municipality can make the investment for pollution control only by restricting expenditures for other municipal activities.[10]

Since a state has a strong stake in the ability of in-state sources such as municipal treatment facilities to serve and support its residents, a state agency has an incentive not to set water quality standards that are impossible or economically infeasible for such sources. However, a downstream state has no such incentive to consider the feasibility of its standard for upstream sources,

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[9] 117 Cong. Rec. 38,805 (Nov. 2, 1971) (statement of Sen. Randolph), *reprinted in* 2 Senate Comm. on Public Works, 93rd Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 1272 (1973).

[10] EPA, *Water Quality Standards Handbook* 2-11 (Dec. 1983).

because there is no commonality of social and economic interests. Thus, under the Tenth Circuit's decision, states will have no obligation to weigh the harmful impact of their standards on all affected parties as contemplated by Congress and EPA. *See International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987).

For example, EPA's regulations now permit states to revise their water quality standards if attainment is not feasible because the standards "would result in substantial and widespread economic and social impact." 40 C.F.R. § 131.10(g)(6). There is no reason to expect that a downstream state will give adequate consideration to the economic or environmental impact of its water quality standards on an upstream state. Nor is a downstream state likely to make accommodations when setting its standards, even though a source state agency would find those accommodations appropriate. Furthermore, a state can grant variances from its own water quality standards to individual facilities that cannot meet a standard.[11] Again, however, a downstream state has very little incentive to consider the circumstances of an out-of-state facility and grant a variance when appropriate.

For all these reasons, the Tenth Circuit's holding leaves municipalities and other sources discharging into interstate waterways completely at the mercy of downstream states. There is nothing to guarantee meaningful consideration of the potentially devastating impact that a downstream state's chosen water quality standards may have on upstream sources, nor will EPA be allowed to prevent the unreasonable consequences that may result from the extra-territorial application of downstream standards. The amici cities and associations submit that Congress never intended the outcome ordained by the Tenth Circuit, which would inevitably lead to unjust and unreasonable consequences for upstream facilities.

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[11] *See* EPA, Water Quality Standards Regulations, 48 Fed. Reg. 51,400, 51,403 (1983).

II. THE TENTH CIRCUIT'S IMPOSITION OF A PERMIT BAN UPSTREAM FROM EXISTING WATER QUALITY VIOLATIONS LACKS ANY BASIS IN THE CLEAN WATER ACT AND WILL INEVITABLY IMPAIR EFFORTS TO IMPROVE WATER QUALITY.

In construing the CWA to ban new permits upstream from existing water quality violations, the Tenth Circuit conceded that its holding lacks an "explicit imprimatur" in the CWA. 908 F.2d at 633. The court nevertheless concluded that "common sense" required a ban on new permits to meet the goals of the CWA.[12] In fact, the CWA envisions a more equitable and less disruptive approach for restoring degraded waterways. States with water quality violations are required to allocate among all existing and new dischargers the total maximum daily load that a particular waterway can accept without exceeding standards. CWA § 303(d), 33 U.S.C. § 1313(d). These maximum daily load allocations are to be completed in phases, based on the priority ranking the state assigns to each waterway within its borders. *Id.* These provisions of section 303(d), which would allow new discharges consistent with an approved wasteload allocation plan, cannot be reconciled with the Tenth Circuit's ban on all new discharges, irrespective of their impact on water quality.[13]

If allowed to stand, the Tenth Circuit's decision would disrupt one of the principal goals of the CWA—the construction of publicly-owned wastewater treatment plants. CWA § 101(a)(4), 33 U.S.C. § 1251(a)(4). To achieve

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[12] 908 F.2d at 631 ("Common sense dictates that a pollution control strategy designed to prevent, abate, and eliminate pollution would be subverted by allowing a new source of pollution on a currently polluted water course.").

[13] The Tenth Circuit's holding would also prohibit a new discharge that will have no detectable impact on water quality, and therefore would not contribute to an existing violation. There is no basis for such an extreme result in the language or legislative history of the CWA.

the CWA's goals of improving water quality, EPA has estimated that over 6000 new plants will have to be built at a cost of some $108 billion by the year 2000.[14] The decision below would prevent many of these plants from obtaining NPDES permits because a significant proportion of the nation's waterways have existing violations of water quality standards. According to EPA's most recent *National Water Quality Inventory*, thirty percent of the river and stream miles that have been assessed nationwide do not fully comply with applicable water quality standards.[15] The Tenth Circuit's decision would effectively block any new discharge permit for a plant that is upstream from a river segment with an existing water quality violation.

The lower court's supposed "solution" is thus counterproductive to the central aims of the Act. Prohibiting permits for new municipal wastewater treatment plants frustrates, not promotes, the improvement of water quality. A recent EPA study found that the construction or upgrading of municipal treatment plants substantially improved downstream water quality in almost every case.[16] The pending case is illustrative. The Tenth Circuit would block the permit for a new $40 million state-of-the-art municipal treatment plant which discharges much cleaner effluent than the older facility it was built to replace. If applied nationwide, this decision will prevent the permitting and operation of many new plants currently under construction, and create a strong disincen-

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[14] *Amending the Clean Water Act: Hearings on S. 53 and S. 652 before the Subcomm. on Environmental Pollution of the Senate Environment and Public Works Comm.*, 99th Cong., 1st Sess. 309 (1985).

[15] EPA, *National Water Quality Inventory, 1988 Report to Congress* 1-3 (EPA 440-4-90-003, Apr. 1990).

[16] EPA, *Before-and-After Case Studies: Comparisons of Water Quality Following Municipal Treatment Plant Improvements* (EPA-430/9-007, May 1984).

tive for municipalities to construct new or upgraded facilities.[16]

In addition to blocking new upstream plants from obtaining permits, the decision below will halt the operation of many existing treatment plants that may be required to obtain new permits. For example, in accordance with the 1987 amendments to the Clean Water Act, EPA recently enacted regulations requiring certain municipalities and industrial facilities to obtain new permits for storm water discharges. CWA § 402(p), 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26. EPA has estimated that at least 173 cities and 47 counties, as well as over 100,000 industrial plants, will be required to obtain storm water discharge permits. EPA, NPDES Application Regulations for Stormwater Discharges, 55 Fed. Reg. 47,989, 48,073-74 (1990). If the Tenth Circuit's decision were allowed to stand, these facilities will not be able to obtain the required permits if they happen to be upstream from an existing water quality violation and their storm water contains even trace quantities of a relevant pollutant.

Many municipalities may thus suddenly be forced to shut down their treatment plants, leaving no legal means of collecting and removing wastewater. Such facilities provide an essential service to millions of households, businesses, and government buildings across the country and are an integral part of the federal program for improving water quality. Congress never intended the extreme rule adopted by the Tenth Circuit, which will result in blocking the construction or operation of many of these essential wastewater treatment plants.

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[17] Since the Tenth Circuit's permit ban holding only blocks permits for new discharges, it will not apply to existing facilities that may be equipped with inadequate and outdated pollution control technologies. Consequently, court's holding will have the perverse effect of blocking the replacement of such facilities with new, modern facilities that will substantially reduce pollution discharges.

By affording states the flexibility and time to bring degraded waterways into compliance with water quality standards, Congress manifestly intended to prevent the severe economic and social disruption that the Tenth Circuit's permit ban requirement will cause. Unless overturned, the court of appeals' decision will also undermine the CWA's very goal of improving water quality by blocking the approval of permits for municipal wastewater treatment plants.

CONCLUSION

For the foregoing reasons, the Supreme Court should reverse the judgment of the Tenth Circuit.

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